

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In Re

Reexamination of the Policy
Statement on Comparative
Broadcast Hearings

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) GC Docket No. 92-52
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JUL 22 1994

To: The Commission

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

COMMENTS OF SCRIPPS HOWARD
BROADCASTING COMPANY

SCRIPPS HOWARD BROADCASTING
COMPANY

BAKER & HOSTETLER
1050 CONNECTICUT AVENUE, NW
SUITE 1100
WASHINGTON, DC 20036
(202) 861-1500

Kenneth C. Howard, Jr.
Sean H. Lane

Its Attorneys

Date: July 22, 1994

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Introduction and Background

Scripps Howard Broadcasting Company ("Scripps Howard"), licensee of television Station WMAR-TV, Channel 2, Baltimore, Maryland, through counsel, hereby submits comments in the above-captioned proceeding.¹ Scripps Howard's application for renewal of Station WMAR-TV's license, filed in 1991, was designated on April 1, 1993 for comparative hearing with a mutually exclusive application for new facilities filed by Four Jacks Broadcasting, Inc. ("Four Jacks"). That comparative hearing is now proceeding in MM Docket No. 93-94. Accordingly, Scripps Howard is particularly interested in the criteria that will be employed to resolve pending comparative renewal proceedings in light of the now final decision in Bechtel v. FCC ("Bechtel"), 10 F.3d 875 (D.C. Cir. 1993). These comments address that issue.

¹ Second Further Notice of Proposed Rulemaking ("Second Notice"), FCC 94-167 (released June 22, 1994).

Last year, Scripps Howard and Four Jacks completed the comparative phase of the hearing, and the record with respect to comparative issues was closed on December 20, 1993.² This occurred prior to the issuance of the Commission's freeze order, FCC 94-41, on February 25, 1994.

In its application and subsequently at the hearing, Four Jacks claimed integration credit for three of its four principals, and Scripps Howard addressed the elements of that issue during the comparative phase of the hearing. Scripps Howard expected to argue in its proposed findings, inter alia, that Four Jacks' principals' integration pledges could not be credited and that no integration credit could be awarded. Scripps Howard is concerned that its interests would be unfairly prejudiced if, at this late stage, Four Jacks' principals should be permitted a second opportunity to formulate their challenge to WMAR-TV's renewal under new decision-making criteria.

A. The course that best serves the public interest while preserving the legitimate interests of litigants in pending renewal cases is to proceed in those cases without further application of the integration criteria.

1. The best course for handling pending comparative renewal cases involving integration claims appears to be simply

² See Order, FCC 93M-713 (released November 18, 1993). The Presiding Judge, however, granted motions by Scripps Howard and Four Jacks seeking basic qualifying issues against each other, and the Presiding Judge subsequently directed that proposed findings of fact and conclusions of law would be delayed pending completion of this second phase of the proceeding. Order, FCC 94M-53 (released February 2, 1994).

to proceed to decision without further consideration of claims for integration credit or any of its enhancements.³ The Commission's standard practice in cases where applicant's interests are affected by the voiding of a comparative criterion is to proceed without granting consideration to the discredited factor. Lamprecht v. FCC, 958 F.2d 382, 399 (D.C. Cir. 1992) (FCC must determine who, in the absence of the female preference, should receive the permit for the station); see Eugene Walton, 7 F.C.C. Rcd 3237, N. 7 (1992) (Commission not applying female preference and deciding case on other existing criteria), reconsideration denied 7 F.C.C. Rcd 6038; see also Eve Ackerman, 7 F.C.C. 2493, 2496 n. 10 (Rev. Bd. 1992).

2. The language of the Bechtel ruling also suggests that the best course is to proceed with pending renewal applications by applying existing criteria absent integration. The explicit mandate of the Bechtel decision is that applicants are entitled to a proceeding in which the Commission considers any application properly before it under standards free of the integration policy. Bechtel, 10 F.3d at 887.

³ An exception would appear necessary where minority ownership enhancement is involved since there is an apparent conflict between the Bechtel court's plain instructions and the Commission's statutory duty not to reconsider its policies with respect to encouraging minority ownership. See Second Notice at 1, n.3. In the WMAR-TV renewal proceeding, however, neither applicant has claimed any preference for minority ownership, and this issue should not drive general policy where minority ownership is not implicated. Indeed, the congressional mandate may require specifically that the Commission simply continue to consider integration where it is enhanced by minority ownership. Such an approach would be justified by the statutory mandate rather than resting solely on agency policy.

3. This also is the fairest means of addressing pending comparative renewal cases. There is no way to ensure that particular applicants' interests will not be prejudiced when the decision-making criteria are changed in an ongoing proceeding, but the applicant which placed its reliance on the invalid preference is plainly the most appropriate party to bear the risk of a ruling that that preference is invalid.

4. It also would be bad public policy to subject pre-Bechtel renewal applicants to a comparative assessment on the basis of criteria that necessarily were unknown to the incumbent applicant during the time that is at issue in assessing that applicant's performance. The underlying rationales for awarding a renewal expectancy include encouraging "investments to ensure quality service" by existing licensees in anticipation that such investments will be rewarded by permitting the continued operation of the station. See Central Florida Enterprises, Inc. v. FCC, 683 F.2d 503, 507 (1982), cert. denied, 460 U.S. 1084 (1983). Retroactively applying standards that were developed after the renewal term has expired necessarily would undermine this important objective by raising the specter that all current broadcast licensees may face renewal challenge risks in the future that cannot be rationally assessed during the license term.

5. Finally, reshuffling the criteria for deciding pending renewal cases would leave these stations' license status in an uncertain state for an indefinite period at a time when

television licensees are confronting unprecedented demands for facilities investment. Such prolonged uncertainty plainly would not serve the public interest.

- B. Alternatively, the Commission should proceed with pending renewal cases under all the pre-Bechtel criteria--including integration--to determine whether an integration preference would be determinative before considering the use of alternative criteria for that adjudication.

6. Despite the concerns expressed above, the Commission may determine that applying new criteria or a new weighting to the remaining post-Bechtel criteria is appropriate in resolving pending comparative renewal proceedings. Should it do so, before applying such revised criteria to any pending case, the Commission should first make a finding that applying these new criteria is necessary to a non-prejudicial resolution of the case.

7. That is, only if an applicant in a pending comparative renewal proceeding could demonstrate that its interests would be adversely affected by the Bechtel ruling should the Commission and the other parties be required to face the immense difficulties and uncertainties of attempting to find and apply an equitable, and judicially sustainable, alternative decision-making process. The only fair approach to implementing revised comparative renewal standards--standards adopted through this rulemaking process--is to apply such new criteria prospectively, not retroactively, whenever possible.

8. Four Jacks, for example, elected to pursue its case for Channel 2 under the claim that three of its principals were

entitled to integration credit. That claim has been litigated, and the record on that issue is closed. If Four Jacks has failed to support its integration claim in the hearing, basic fairness requires that that failure should preclude Four Jacks from presenting a different case for supplanting Scripps Howard as the licensee of Channel 2 under some new standard. To hold otherwise would permit a comparative upgrade--in violation of long established comparative hearing policy--and would actually reward the challenger for relying on invalid criteria.

9. Permitting the Presiding Judge to make findings on integration claims in this context is fully consistent with Bechtel. Bechtel's holding only prohibits the award of a license based on the integration criterion. Bechtel, 10 F.3d at 887. It in no way compels, or even supports, granting parties who fail to show that their integration claims are warranted an opportunity to pursue a different theory long after their applications were filed. Further, if the merits of a case can be assessed on the other comparative criteria which remain valid after Bechtel, that is by far the preferred means of proceeding because then no party could be prejudiced due to the employment of post hoc decision-making criteria.

10. Consideration of revised standards for the majority of new-applicant proceedings in a rulemaking appears appropriate and necessary. Adopting revised decision-making criteria to apply to an ongoing adjudicative renewal proceeding is inherently tainted with the appearance of post hoc rationalization and should be

avoided if at all possible. Adopting a different approach in the renewal context is, of course, fully permissible because it is well recognized that renewal proceedings may appropriately be governed by different standards than those applying to proceedings involving only new applicants. See FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 811 n.31.

C. Permitting the amendment of applications in pending comparative renewal proceedings is wholly impermissible.

11. For similar reasons, it would be unfair to permit renewal challengers to amend their applications in order to present a better comparative challenge than they presented when initially challenging the incumbent's renewal. Challengers almost always are not ongoing businesses, and thus they have relatively unfettered discretion to adapt to any structure that the Commission may deem preferable in an applicant.

12. No public policy goal is served, however, by license applicants engaging in contortions just to meet Commission preference standards. Indeed, one of the Bechtel court's main concerns was that applicants for FCC licenses appeared to be structured not to serve any "real world" purpose, but to conform to the Commission's untested concept of a better structured licensee. See Bechtel, 10 F.3d at 880-81 & 887. Any process that permitted renewal challengers to restructure based upon untested new criteria would surely be subject to invalidation on the same grounds.

13. Should the Commission nevertheless conclude that amendment of applications in comparative renewal proceedings is permissible, both incumbent licensees as well as challengers should be permitted full opportunity to amend their applications, and any amendment by the incumbent licensee should be deemed not to diminish that applicant's renewal expectancy. The Commission should also expressly state that such amendments may include permitting the inclusion in the record, if desired by the incumbent, of renewal expectancy evidence based on the incumbent's programming through the newly established amendment deadline.

D. Any perceived prejudice to challengers would be reduced or eliminated by the fact that all licensees must periodically seek renewal.

14. The fact that television broadcast licenses are not indefinite, but must be renewed every five years, provides a more than adequate remedy to any disappointed challenger. If a challenger believes that the revised criteria will offer its principals an opportunity to mount a successful challenge, they may do so at the next license renewal window. Such a window would open for Station WMAR-TV, for example, in 1996--almost certainly well before any decision in this proceeding that adopted revised criteria to apply in ongoing renewal proceedings could be final.

E. New criteria should be accompanied by a new process.

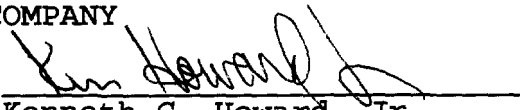
15. Finally, with respect to any new criteria that may be deemed appropriate for new renewal challenges, the Commission should consider using this opportunity to institute a two-stage renewal process in broadcasting, just as it has deemed should apply in the common carrier cellular license renewal context. See License Renewals in the Domestic Public Cellular Radio Telecommunications Service (Reconsideration) ("Cellular Renewals"), 8 F.C.C. Rcd 2834, 2836 (1993), reconsideration denied 8 F.C.C. Rcd 6288. That is, the contested renewal process should explore whether the performance of the incumbent licensee is such as to warrant a renewal expectancy; then, if this review concludes that a renewal expectancy is not warranted, comparative criteria would apply. See id. Although the Court of Appeals rejected such a process for broadcast renewals under very different circumstances years ago, the changes wrought by Bechtel, as well as market changes and increased opportunities

for offering video programming via alternatives to broadcasting,
warrant revisiting this basic question.

Respectfully submitted,

SCRIPPS HOWARD BROADCASTING
COMPANY

By:


Kenneth C. Howard, Jr.
Sean H. Lane

BAKER & HOSTETLER
1050 Connecticut Avenue, NW
Suite 1100
Washington, DC 20036
(202) 861-1580

Its Attorneys

July 22, 1994

Certificate of Service

I, Diane G. Wright, a secretary in the law offices of Baker & Hostetler, hereby certify that I have caused copies of the foregoing "COMMENTS OF SCRIPPS HOWARD BROADCASTING COMPANY" to be sent this 22nd day of July, 1994, via United States First Class Mail, postage prepaid, to the following:

Martin R. Leader, Esq.
Kathryn R. Schmeltzer, Esq.
Gregory L. Masters, Esq.
Fisher Wayland Cooper Leader & Zaragoza
2001 Pennsylvania Avenue, N.W.
Suite 400
Washington, DC 20006
Counsel to Four Jacks
Broadcasting, Inc.

Robert Zauner, Esq.*
Hearing Branch-Mass Media Bureau
Federal Communications Commission
2025 M Street, NW
Room 7212
Washington, DC 20554


Diane G. Wright

* By Hand.